Public Knowledge

Telecommunications Act Rewrite
Question Responses
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Committee on Energy and Commerce
Subcommittee on Communications and Technology
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Public Knowledge appreciates the opportunity to participate in this House Energy and Commerce Committee effort to examine a possible rewrite of the Telecommunications Act. Such a process could take years, but we look forward to a discussion a process that is inclusive of all stakeholders along every step of the way.

The current communications laws have served the nation well and continue to empower the FCC ensure that it works well for all Americans. It has allowed for great innovation and new services that did not exist in 1996. Most importantly, it has remained true to the values that were central to the original crafting of communications law a century before. Laws may be updated or clarified, but it is always important to remember the central reasons for the existing laws and ensure that the public's expectations around their communications networks continue to be protected.

We know that the five questions released by the Chairman of the Energy and Commerce Committee Subcommittee on Communications and Technology are just the beginning of a broader discussion. These five questions do not cover all of the possibilities for reforming and rewriting the Act, but we have developed some initial responses, below, to help the Subcommmittee start to think about how to approach this work. We look forward to continuing the discussion in greater detail through meetings, hearings, and other activities in the future.

1. The current Communications Act is structured around particular services. Does this structure work for the modern communications sector? If not, around what structures or principles should the titles of the Communications Act revolve?

There is nothing wrong with a "services"-based approach. In fact, a focus on services from the perspective of the consumer is probably the best place to start. It is, however, troubling when legal rules differ depending on what technology services are offered using, when this technology makes no difference from the perspective of the user. This can create opportunities for regulatory arbitrage and encourage investment in inferior technologies.

However, there still can be times when it makes sense for policymakers to make distinctions between services on the basis of the technologies they use, or the resources they consume. For

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example, an audio stream delivered via the Internet and one broadcast over the air might be indistinguishable from the perspective of a consumer, but it makes sense to require certain public interest duties of entities that use the scarce public airwaves. Additionally, much hinges on whether policymakers actually determine whether services are alike or not. For example, non-interconnected VoIP services (like FaceTime audio) are not part of the public switched telecommunications network and have more limited public interest and safety responsibilities when compared with interconnected VoIP services—these services are not alike, despite the fact that they both offer "voice."

2. What should a modern Communications Act look like? Which provisions should be retained from the existing Act, which provisions need to be adapted for today's communications environment, and which should be eliminated?

Most fundamentally, a new Communications Act should preserve the values embodied by the existing Communications Act. Values such as service to all Americans, competition and interconnection, consumer protection, network reliability, public safety, diversity, and openness do not need to be "upgraded" or changed for the 21st Century—rather, we need to establish how they apply to new technologies.

More specifically:

- A new Act will still need to empower the FCC to ensure that spectrum is used by private, public, and unlicensed users efficiently.

- It will have to address last-mile wireline competition issues, promoting competition where that is possible, and protecting consumers and openness to the extent that competition cannot.

- A new Act should empower the FCC to ensure that networks interconnect.

- A new Act will have to squarely address the video marketplace, ensuring it has a technology-neutral regulatory structure that promotes new forms of video distribution that will give consumers more choice and creators more outlets. Senator Rockefeller's recent bill (S.1680) represents the ideal approach: It eliminates arbitrary distinctions between video delivery platforms, while enacting measures that are designed to counter the influence of incumbents and gatekeepers on the further development of the video marketplace.

- A new Act will have to address the role of the PSTN in a multi-network world. Phone calls and legacy TDM services should work reliably whether they are carried over private IP networks, the Internet, wireless, or twisted pair copper.

- A new Act should ensure that media serves the needs of the public. Among other things, this means that diverse voices are heard, that media is accessible to people with disabilities, and that people have access to local and emergency information.

The Commission should be empowered to promote free speech by taking steps to ensure that the Internet remains an open platform open to minority voices.

- A new Act should ensure that local communities have autonomy and the ability to take steps to ensure they have suitable communications infrastructure.

3. Are the structure and jurisdiction of the FCC in need of change? How should they be tailored to address systemic change in communications?

The FCC's structure as a five-member, independent agency, and its basic subject matter jurisdiction (communication by wire or radio) do not need to change.

There are a number of ways that internal FCC procedures could be improved. The public needs more access to data about licensing, competition, and service availability. The FCC could certainty better manage its information systems and docket management.

The FCC would also benefit from additional internal resources. On too many issues, the Commission has no choice but to decide between conflicting economic models, sets of data, and engineering analyses, rather than creating their own. This means that the FCC can sometimes create rules based on a skewed understanding of the business and technological climate—especially on more technical issues, where the parties most motivated to provide the Commission with data are the regulated parties themselves. To remedy this, the Commission needs more internal economic and technological expertise to draw on.

Additionally, much of the FCC's work that regulates content directly should be reformulated. Now that consumers have more media choices and control over what they let into their homes, and now that speakers and creators have more outlets than ever before, the FCC can put an end to its attempts to keep the airwaves clear of "indecency." While all wireless licensees and broadcasters continue to have an enforceable obligation to serve the public interest (including limited content-related obligations), the justification for puritanical speech controls has expired. The FCC should continue to promote speech, by ensuring that creators, speakers of all backgrounds, and minority voices are able to access communications media and take advantage of open and nondiscriminatory networks, and by taking steps to assure that the media are adequately serving information needs of children, people with disabilities, and local communities. However, the FCC's speech-related goals should be to promote speech and avenues for speech, not to suppress speech some may find objectionable.

4. As noted, the rapidly evolving nature of technology can make it difficult to legislate and regulate communications services. How do we create a set of laws flexible enough to have staying power? How can the laws be more technology-neutral?

Congress should not be afraid of the Chevron doctrine and the delegation of rulemaking authority to expert agencies. It should draft its statutes to give the agency the flexibility it needs to adapt Congressional policies and goals to new technologies and new marketplace conditions.

It is beyond question that Congress always should and does retain ultimate legislative and budgetary authority and has the ability to check an agency. Agencies must comply with the APA, take public comment, and issue reasoned decisions that carefully weigh the evidence before adopting new rules or taking adjudicatory action. Their orders can be challenged in federal appeals courts. Given these various backstops, in a highly technical and dynamic area such as communications, Congress would do well to rediscover the joys of delegation.

This does not mean that Congress should simply direct the FCC to regulate communications "in the public interest." Congress should direct the FCC to achieve specific goals—such as universal service, interconnection, open networks, competition, and efficient use of spectrum. (On this note, the DC Circuit's recent decision vacating most of the Commission's Open Internet rules is troubling. On the one hand, the decision limits the FCC's ability to impose "common carrier-like" rules on services that it has not classified as "telecommunications." Simultaneously, however, the Court interpreted Section 706 of the Communications Act as granting the FCC extremely broad authority over broadband.)

Congress should give the Commission the statutory authority necessary to carry out the goals it directs the FCC to achieve. However, many of the details of how best to achieve those goals in a changing communications environment are best left to an independent, expert agency.

Additionally, Congress should resist calls to transfer Commission functions to the Federal Trade Commission (FTC), or to equate communications law with competition law. While communications markets are dynamic, certain issues recur. Last-mile networks are expensive and can tend toward natural monopoly. Interconnection remains necessary to ensure competition, yet dominant providers may resist it. By itself, the free market will not ensure that networks are universally built-out and affordable. While antitrust and other forms of competition law have their place in ensuring that the communications market functions efficiently, the concerns of communication law are broader, while at the same time lending themselves to narrower legal approaches.

5. Does the distinction between information and telecommunications services continue to serve a purpose? If not, how should the two be rationalized?

Yes, because there is an abiding distinction between applications that connect to networks, and the networks themselves. When competition problems arise in an application marketplace, standard antitrust policies, adapted to the facts of the particular market, usually suffice. (This is not to say that the prevailing theories of antitrust are necessarily the right ones.)

Competition law, however, is not well-suited to infrastructure issues where high capital expenditures and other high financial barriers to entry apply, and markets tend toward limited competition or natural monopoly. A judicial opinion or an FTC order cannot create competition in places where it's uneconomic. In those situations, communications policies such as open access, or network neutrality, can to an extent replicate the effects of competition. Additionally, domain-specific policies may be necessary in areas where an equitable distribution of (or access to) scarce resources, such as spectrum or rights-of-way, is necessary to ensure a degree of consumer choice.

By contrast, information services like search engines, social networks, and database services may, like any other line of business, suffer from competition problems. However, they are not as prone to the particular competition challenges that arise most frequently in last-mile communications infrastructure markets.

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VIA EMAIL / CommActUpdate@mail.house.gov
AND US MAIL

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Dear Committee Members:

The Boards of Directors for the Adams County E-911 Telephone Service Authority, the Arapahoe County Emergency Communications Authority, and the Jefferson County Emergency Communications Authority (the "911 Authorities") write in response to the Committee on Energy and Commerce's (the "Committee") request for comments on modernizing the Communications Act. The 911 Authorities represent four of the largest counties in the Denver metro area[1] and fund emergency communications services, including 911, to over 1.6 million Coloradans.

The Committee's request for comments posed five questions. Some of the questions deal with issues that are beyond the purview of the 911Authorities. The 911 Authorities are only concerned with emergency 911 services. Any modifications to the Communications Act should ensure that emergency 911 services are reliable, resilient, and cost-effective and that States can continue to regulate emergency 911 service.

The traditional circuit switched telephone network is undergoing a shift to being provided via internet protocol ("IP"). While there are tremendous benefits to using IP to provide voice services (as well as the provision of countless other services), it simultaneously puts into question every state's jurisdiction to regulate intrastate voice services and, by extension, IP-enabled emergency 911 services. This even puts into question the very authority to fund the emergency 911 system (Colorado funds its 911 system through an emergency telephone charge on voice service). Any amendments to the Communications Act should protect each state's right to regulate emergency 911 services.

The 911 Authorities believe that states are the appropriate body to regulate emergency 911 services, regardless of the form of communication or the technology used. States best understand their own unique challenges faced by emergency first responders, *i.e.*, emergency medical services, law enforcement, and fire protection. Each state also operates its 911 system in a unique way. In Colorado, 911 dispatch services are under local government control. States should be allowed to regulate in a

[1] The Jefferson County Emergency Communications Authority also serves Broomfield County.

fashion that best suits them and takes into account each state's needs. Additionally, emergency 911 services are fundamentally an intrastate service –a 911 call originates and terminates in the same state. A federal mandate for state level 911 services is inappropriate and counterproductive.

The historical reason for regulating communications services is economic, that is, to prevent the exercise of monopoly power by carriers and to ensure a certain level of universal service at affordable rates to everyone. The regulation of emergency 911 services rests on a different justification: public safety. It may be appropriate to lighten regulatory obligations on carriers as competition increases (this is one of the areas outside the 911 Authorities purview), but that same argument for lightening regulatory obligations for communications services does not apply to emergency 911 services because public safety is still an issue.

The FCC has a legitimate role in setting certain national standards for 911 emergency service. For example, it may be beneficial to set national standards for interoperability of emergency communications equipment or for the technical delivery format of NextGen 911 communications. But beyond the possibility of federal involvement to set a few baseline standards, states should have the regulatory authority over emergency 911 services.

Sincerely,

STEVENS, LITTMAN, BIDDISON, THARP & WEINBERG, LLC

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